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IN THE

Supreme Court of the United States

October Term, 1953

No. 295

Estate of ARTHUR S. DWIGHT, Deceased, BARBARA CHAPIN HAMBY and JOSEPH C. BENSON, Executors,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION AND BRIEF ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN C. CRAWLEY,
Attorney for Petitioners.

DANA R. KOONS,
of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

May it please the Court:

Barbara Chapin Hamby and Joseph C. Benson, Executors of the Estate of Arthur S. Dwight, deceased, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 3, 1953, reversing a decision of the Tax Court of the United States in favor of petitioners (R. 34-41).

Summary Statement

This proceeding was brought by petitioners for a redetermination of a Federal estate tax deficiency determined by the Commissioner on the estate of Arthur S. Dwight, who died on April 1, 1946, a resident of New York.

As set forth in the opinion (R. 34), the decedent married Anne Howard Chapin on March 15, 1930. She then had

six children by a previous marriage, all of whom were adults except one, who became of age prior to decedent's death. Subsequent to such marriage, decedent established two irrevocable trusts, with a New York bank as trustee, which were still in existence at the date of his death.

The first trust, made on December 21, 1931, in the amount of $170,000 and later increased by $25,000, was to continue during the joint lives of decedent and his wife and the entire net income was to be distributed by the trustee to and among decedent's wife and her six children "for their support and maintenance, without power of anticipation" in the proportions of 40 per cent to the wife and 10 per cent to each of her six children. The trust provided that the trustee should not be responsible for the use or application of such income. Upon the death of the survivor of decedent and his wife, the trust principal was to be distributed to her children or their issue.

The second trust, made on August 15, 1935, in the amount of $200,000 was to continue during the life of the wife only and the entire net income paid over to her by the trustee "for her support and maintenance, without power of anticipation". Upon the death of the wife, the trust principal was to be distributed to her children and two cousins of decedent, or their issue (R. 9-10).

In connection with the second trust, the decedent also wrote a letter addressed to his attorneys (R. 31) which was dated prior to, although not delivered until shortly after, the execution of the trust indenture. Decedent's expressed purpose in so doing (R. 33), was to show that his motives in establishing the second trust were to provide his wife with income to meet the living and hospital expenses of her two adult invalid daughters and also to meet the maintenance expenses of a winter home in Florida which he had theretofore given her. Decedent's wife testified substantially to the same effect (R. 24-25).

At all times during the marriage, decedent and his wife lived together as husband and wife at their principal residence in Great Neck, New York, except for winters which were spent at the Florida home. The decedent paid all the expenses of running the home in Great Neck. After the establishment of the first trust in 1931, the wife paid for her clothing and personal needs.

The Commissioner originally contended that the entire corpus of both trusts was includible in the decedent's gross estate, as being in discharge of a legal obligation, because in each of the indentures it was provided that the net income be paid to the beneficiaries "for their support and maintenance". After the decision by the Tax Court overruling his contention, the Commissioner conceded on appeal that the law of New York imposed no legal obligation upon decedent to support his surviving stepchildren, all of whom were adults at the time of his death. Accordingly, the issue on appeal was limited to 40 per cent of the corpus of the first trust and the entire corpus of the second trust, from which the net income was payable to the wife.

In reversing the Tax Court's decision, the Court of Appeals held that under Section 811 (c) (1) (B) of the Internal Revenue Code, 40 per cent of the value of the first trust and the entire value of the second trust were includible in the decedent's gross estate. The Court of Appeals took the view that the provision for payment of 40 per cent of the income of the first trust to decedent's wife for her "support and maintenance", must be construed as a discharge by decedent, in part at least, of his legal obligation to support her and that even though the trust contained no provision for supervision of the wife's expenditures, as in *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224; cert. denied 310 U. S. 654, the existence of the trust income would have been a *pro tanto* defense by the husband in any suit for support brought by his wife

and he therefore retained the enjoyment of that income, since it was to be applied toward the discharge of his legal obligation.

The Court of Appeals reached the same conclusion as to the second trust, after holding in effect that the decedent's letter of intention which had been admitted in evidence by the Tax Court over the Commissioner's objection, was incompetent, because the Court of Appeals reasoned that if the wife had sued for support, the parole evidence rule would have prevented her from showing that the income from the second trust was not to be used for her support and maintenance and the existence of that trust would also have been a *pro tanto* defense to the husband.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254, Title 28 and Section 1141 (a), Title 26 of the United States Code.

Questions Presented

The primary question in this case is whether 40 per cent of the corpus of the first trust and all of the corpus of the second trust above referred to should be included in the gross estate of the deceased grantor, for purposes of the Federal estate tax under Section 811 (c) (1) (B) of the Internal Revenue Code (Appendix A, *infra*).

A further question is whether extrinsic evidence offered by the petitioners and received by the Tax Court was admissible, as against the Commissioner, to show that in establishing the second trust, the deceased settlor did not intend to restrict his wife in any way to the use of the income for her support and maintenance.

Reasons Relied On For the Allowance of the Writ

1. The decision of the Second Circuit Court of Appeals in applying the provisions of Section 811 (c) (1) (B) of the Internal Revenue Code to the trusts in this case, on the facts, goes considerably beyond the scope of the decision of the Eighth Circuit Court in *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. 2d 224; cert. denied 310 U. S. 654. The question of taxation involved is of importance to taxpayers generally in the field of estate tax. It has not been, but should be, settled by this Court.

2. In determining the questions as to the legal interests or rights which were created by the two trust indentures in this case, the Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions.

WHEREFORE, your petitioners pray that the writ be granted.

Dated, August 27, 1953.

JOHN C. CRAWLEY,
Attorney for Petitioners.

DANA R. KOONS,
of Counsel.

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Estate of ARTHUR S. DWIGHT, Deceased, BARBARA CHAPIN HAMBY and JOSEPH C. BENSON, Executors,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals (R. 34-41) is not yet reported.

The opinions of the Tax Court (R. 3-18) are reported in 13 TC 1317.

Jurisdiction

The opinion of the Court of Appeals is dated June 3, 1953 and judgment was entered on the same day (R. 41).

As stated in the preceding petition, jurisdiction of this Court is invoked under Section 1254, Title 28 and Section 1141 (a), Title 26 of the United States Code.

The case involves Federal estate taxes and was brought to the Court of Appeals by petition for review, filed by the Commissioner of Internal Revenue.

Statement of the Case

This has already been set forth in the preceding petition.

Specification of Errors

1. The Court of Appeals erred in finding and holding that 40 per cent of the corpus of the first trust and the entire corpus of the second trust created by the decedent were includible in his gross estate for purpose of the Federal estate tax under Section 811(c)(1)(B) of the Internal Revenue Code, because of the provision in each of the trust indentures that the income was to be paid to decedent's wife for her "support and maintenance".

2. The Court of Appeals erred in finding and holding that *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 8 Cir., 111 F. 2d 224; cert. denied 310 U. S. 654, is not distinguishable on the ground that there the settlor reserved an "enforcible right" to have the income applied toward his wife's support in the trust instrument.

3. The Court of Appeals erred in finding and holding that under the law of New York, the decedent having furnished his wife with such trust income, he had in part at least discharged his legal obligation of supporting her and that the existence of the income would have been a *pro tanto* defense in any suit for support brought against decedent by his wife.

4. The Court of Appeals erred in finding and holding that since the trust income was "to be applied toward the discharge of a legal obligation of the decedent", he retained the enjoyment or use of that income.

5. The Court of Appeals erred in finding and holding that the second trust indenture created a legal obligation on the part of the trustee to pay the income to decedent's wife for her "support and maintenance".

6. The Court of Appeals erred in finding and holding that extrinsic evidence offered by petitioners and received by the Tax Court was inadmissible to show that in establishing the second trust the decedent did not intend to restrict his wife in any way to the use of the income for her support and maintenance.

7. The Court of Appeals erred in reversing the decision and judgment of the Tax Court as to 40 per cent of the corpus of the first trust and the entire corpus of the second trust.

ARGUMENT

The decision of the Court below is erroneous and contrary to, in conflict with or a misinterpretation of controlling New York decisions.

In reversing the Tax Court, the Court of Appeals did not find that the decedent had retained any control over the application of the trust income. Nor did it hold that the trusts were taxable because any of such income was actually used by the wife for her support. What the Court of Appeals did hold was that 40 per cent of the first trust and all of the second trust were taxable because the income therefrom was "to be applied" toward the discharge of decedent's legal obligation to support his wife. The Court of Appeals evidently took the view that by furnishing his wife with the trust income, the decedent had in part at least, discharged his legal obligation of supporting her and that the existence of the trust income would have been a *pro tanto* defense in any suit for support brought by the wife.

Decedent retained no control over the application of the trust income; nor was such control vested in the bank trustee. It is not accurate to say, as did the Court of Appeals with regard to the second trust, that the trust indenture created a legal obligation on the part of the trustee to pay the income to the wife for her "support and maintenance". The sole obligation of the trustee was to pay the net income to the wife (*Matter of Wilkening,* 137 Misc., N. Y. 451, 454; see also authorities referred to in footnote 4, Tax Court opinion at R. 16). The moment any income was paid over by the trustee to the wife, it became her vested property, free from any restraint. (*Matter of Lynch,* 151 Misc., N. Y., 549; *Commissioner* v. *Porter,* 148 F. 2d 566).

However, the Court of Appeals reasoned that having furnished his wife with the trust income, the husband had in part at least, discharged his legal obligation of supporting her. To demonstrate the fallacy of that reasoning, let us suppose that owing to some change in the husband's economic circumstances, or for any other reason, the wife had voluntarily turned over to him all of her income from these trusts, as she received it. In that case, it could hardly be asserted that solely by reason of the income payments to the wife, the husband had thereby been discharged to that extent from his obligation to support her, the same as in the case of any ordinary debt. The husband's duty to support does not depend upon any contract with his wife, and in this case, where the parties were living together, there could be no arms-length agreement between them reducing the husband's obligation to its monetary equivalent (*Garlock* v. *Garlock,* 279 N. Y. 337). There the Court said (at p. 341):

> "The husband is obliged to support his wife in accordance with his condition in life as long as they are living together as husband and wife, and contracts made which place any limitations upon the obligation imposed by law are illegal and of no effect."

Furthermore, it is well settled in New York that although a wife may sue her husband to recover moneys actually expended from her separate estate for necessaries, or on a separation agreement, an action for maintenance and support as such, is not maintainable. It is only where an action is brought by the wife for divorce or separation, that an allowance of alimony is proper (*Ramsden* v. *Ramsden*, 91 N. Y. 281). See also *Weintraub* v. *Weintraub*, 302 N. Y. 104, 108, where the New York Court of Appeals said:

> "The wife's right to alimony is not 'a private claim or demand' arising out of the marriage of the parties. That right comes from the statute and not from the common law. * * * *Such a claim in itself furnishes no foundation for a cause of action; it is a mere incident of the judgment in a matrimonial action.* * * * The parties by themselves were without power permanently to fix or to alter their marital status or the scope of the obligations arising from the marriage relationship by consent, stipulation or their own conduct." (Emphasis in original.)

On the facts in this case, the principle of *Helvering* v. *Mercantile-Commerce Bank & Trust Co.* is inapplicable.

The decision of the Second Circuit Court of Appeals in the instant case goes a good deal further than the successful Government argument in *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 8 Cir. 111 F. 2d 224, cert. denied 310 U. S. 654.

In that case, the trust was created pursuant to a prenuptial agreement. The reservation by the settlor was to the effect that if, at any time, the wife should not use her income from the trust, which was fixed $417 per month, for the purpose of paying her own bills and expenses and providing for her own support, maintenance and care, and in and about the joint living expenses of the parties, then the trustees were to pay those expenses directly. That

could have been accomplished by the husband filing with the trustees an affidavit, accompanied by statements of unpaid bills. It was that feature of the trust which was particularly referred to as the basis for the conclusion in the minority opinion by the Board of Tax Appeals (*Estate of Donnelly,* 38 B. T. A. 1234), and to which the Eighth Circuit Court subsequently referred with approval, in reversing the Board's decision.

Other distinguishing features of the *Mercantile-Commerce Bank* case were that the trust was to continue during the joint lives of the parties, unless sooner terminated by divorce for the fault of the wife or for the fault of the husband, followed by remarriage of the wife. Contemporaneously with the execution of the trust, the husband and wife entered into an agreement which in effect provided that the wife would use the fixed monthly income payments when received by her to pay the expenses as contemplated by the trust. The wife also agreed that the trust provisions were in full discharge of all claims which she might ever assert against her husband for alimony, maintenance, support, or otherwise, in case of a divorce from her husband for his fault. She also released all claims for dower and statutory allowance of every kind.

It should also be noted that in the *Mercantile-Commerce Bank* case the trust was made on November 30, 1933, and the question was whether the trust was taxable under the provisions of Section 803 of the Revenue Act of 1932, which further amended Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931. As so amended in 1932, Section 302(c) provided that there be included in the gross estate of a decedent any transfers under which he had retained for his life or for any period not ascertainable without reference to his death or for any period which did not in fact end before his death, "the posession or enjoyment of, or the right to the income from, the property". This is the same language

now contained in Section 811 (c) (1) (B) of the Internal Revenue Code. The Eighth Circuit Court decided that the reservation by the settlor, of the right to have the trust income applied in discharge of his continuing legal obligations was equivalent to "retaining the right" to that income within the meaning of Section 302 (c), as amended.

However, in the instant case, the first trust was made on December 21, 1931, and by the Technical Changes Acts of 1949 and 1953, that trust is not subject to the provisions of Section 811 (c) (1) (B) of the Internal Revenue Code, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931. That amendment applied only to transfers under which the transferor had retained for his life or for any period not ending before his death, "the possession or enjoyment of, *or the income from,* the property" (emphasis added).

The Court of Appeals erred in holding that extrinsic evidence received by the Tax Court was inadmissible to show decedent's motives in establishing the second trust.

All of our contentions under the preceding Points apply with equal force in the case of both trusts. However, with regard to the second and larger trust, petitioners also offered extrinsic evidence which was received by the Tax Court, for the purpose of showing that in establishing that trust the decedent had no intention of restricting his wife in any way to the use of the income therefrom for her support and maintenance.

In the first place, Mrs. Dwight testified (R. 23) that her requirements for clothing and personal expenses were provided by her 40 per cent share of the income from the first trust, which was always sufficient for those needs. She further testified (R. 24), without objection, that at or

prior to the time the second trust was established, the matter was discussed between the decedent and herself and there was an understanding that the trust was to provide her with additional money to have it for what she wanted to use it for. Mrs. Dwight indicated (R. 24-25) that her need for the money was to meet the expenses of two of her daughters who were invalids, although she said the decedent hoped the income from the second trust would be enough to take care of the expenses of the Florida home as well.

Furthermore, under date of August 5, 1935, the decedent wrote a letter addressed to his attorneys (R. 31), stating that his purpose in establishing the second trust was to provide his wife with approximately $10,000 of additional income, of which about $6000 (or 60%) was intended for annual maintenance expense of the Florida winter home that he had previously given his wife, and about $4,000 (or 40%) was intended to enable Mrs. Dwight to meet the living and hospital expenses of her two adult invalid daughters by her previous marriage. As appears by a handwritten note of decedent (R. 33) dated August 19, 1935, and for reasons explained therein, his letter of August 5, 1935, was not actually delivered until several days after execution of the trust indenture. Both of the letters were received in evidence by the Tax Court over the objection of the Commissioner.

In its opinion, the Court of Appeals did not mention Mrs. Dwight's oral testimony, although it is referred to in footnote 5 to the Tax Court's opinion (R. 16). However, the Court of Appeals held that decedent's explanatory letter of August 5, 1935, was inadmissible, on the ground that in a suit by the wife against her husband for support, the parole evidence rule would have prevented her from showing that the income from the second trust was not to be used for her support and maintenance and the existence of that trust would have been a *pro tanto* defense to the husband.

Passing over the question whether Mrs. Dwight could have sued her husband for support and maintenance, which we have discussed above, pages 9-11, the reasoning of the Court of Appeals ignores entirely the testimony of Mrs. Dwight as to the understanding with her husband as to his purpose in establishing the second trust. It also overlooks the fact that if pursuant to such an understanding, Mrs. Dwight expended the trust income for purposes other than her support, as she evidently did (R. 29-30), the decedent would have been estopped from invoking the parole evidence rule to exclude his letter in any possible suit by his wife. We submit that in such a case, the parole evidence rule would not apply between the parties, even if Mrs. Dwight could be deemed to be a party to the trust agreement on the somewhat attenuated reasoning of the Court of Appeals.

In at least the following cases, it has been held in other Circuits that the parole evidence rule does not apply where it is sought to be invoked on behalf of the Government in a tax case:

Scofield, Collector v. *Greer,* Fifth Circuit, 185 F. 2d 551;
Commissioner v. *H. F. Neighbors Co.,* Sixth Circuit, 81 F. 2d 173, 175;
Arthur R. Jones Syndicate v. *Commissioner,* Seventh Circuit, 23 F. 2d 833;
American Crystal Sugar Co. v. *Nicholas, Collector,* Tenth Circuit, 124 F. 2d 477.

In *American Crystal Sugar Co., supra,* the Court said (at p. 479):

> "The Courts of Utah, in accordance with the great weight of authority, hold that the (parole evidence) rule applies only to controversies between parties to the instrument and those claiming under them. Here, the United States was a stranger to the contract.

> It asserts a tax liability, not a claim derived from either party to the contract, and it could not invoke the parole evidence rule."

The same rule applies in New York, where it was said in the comparatively early case of *Juillard* v. *Chaffee,* 92 N. Y. 529, 534:

> "In this state it (the parole evidence rule) has been thought to be so well settled in reason, policy and authority, as not to be a proper subject of discussion. It has full application, however, within very narrow limits. In the first place it applies only in controversies between parties to the instrument (*New Berlin* v. *Norwich,* 10 Johns 229), and between them is subject to exceptions, upon allegations of fraud, mistake, surprise or part performance of the verbal agreement."

CONCLUSION

It is respectfully submitted that this case warrants review by this Court and petitioners pray that the writ be granted.

JOHN C. CRAWLEY,
Attorney for Petitioners.

DANA R. KOONS,
of Counsel.

APPENDIX A

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(c) [as amended by Sec. 207 (a) of the Technical Changes Act of 1953 (Act of August 15, 1953), P. L. 287.] *Transfers in Contemplation of, or Taking Effect at, Death.*—

(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; * * *

* * *

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the

amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516). [NOTE]

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

NOTE: Section 207 (a) of the Technical Changes Act of 1953 (P. L. 287, Aug. 15, 1953), amending Section 811 (c) (1) (B) of the Internal Revenue Code by adding the last paragraph above set forth, is made applicable to estates of decedents dying after February 10, 1939. However, such amendment makes no material change in the language of Section 7 (b) of the Technical Changes Act of 1949 (63 Stat. 891), which was considered by the Court of Appeals in deciding this case.